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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RONALD FINCHER,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO
THE GEORGIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1981

RONALD FINCHER,	*	
Petitioner,	*	
-v-	*	Case No. _____
STATE OF GEORGIA,	*	
Respondent	*	
	*	

ON WRIT OF CERTIORARI
TO THE GEORGIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Fincher prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia, reversing the judgment of the trial court which had sustained petitioner's motion to suppress evidence.

QUESTION PRESENTED

Was the affidavit on which a search warrant for petitioner's premises issued insufficient under Aguilar v. Texas, 378 U.S. 108 (1964) and its progeny?

PARTIES TO THE PROCEEDING

The following persons or entities are parties to the proceedings: Ronald Fincher, petitioner; the State of Georgia, respondent.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia, reversing the judgment of the trial court, is reported at _____ Ga. App. _____ (1982) (Appendix A). A petition for the writ of certiorari to the Supreme Court of Georgia was denied without opinion. The judgment of the Superior Court of Clarke County sustaining petitioner's motion to suppress evidence is not reported. (Appendix B).

JURISDICTION

The judgment of the Court of Appeals was rendered on February 23, 1982. A motion for rehearing before the Court of Appeals was denied on March 10, 1982. On April 8, 1982, petitioner's application for the writ of certiorari was denied by the Supreme Court of the State of Georgia. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On February 20, 1981, George Garrison, a lieutenant with the Athens (Georgia) Police Department, made application before the Honorable Herbert T. Hutto, judge pro hac vice of the Magistrate's Court of Athens, Clarke County, for the purposes of obtaining a search warrant for the garage apartment where petitioner resided. Judge Hutto issued the requested warrant based solely on the written affidavit which was presented in support of the search warrant application. (Appendix C).

The warrant was executed on February 20, 1981, and resulted in the discovery of a quantity of cocaine, methamphetamines, and marijuana. Petitioner was thereafter indicted for three violations of the Georgia Controlled Substances Act.

Petitioner filed a motion to suppress evidence which was argued before the judge of the Superior Court of Clarke County. The parties stipulated that no evidence was offered to the magistrate other than the written affidavit. Judgment sustaining petitioner's motion to suppress evidence was thereafter entered.

The judgment of the Superior Court of Clarke County was appealed by the State of Georgia to the Court of Appeals which entered a written opinion and judgment, reversing the judgment of the trial court. A timely motion for

rehearing was made and denied in the Court of Appeals of the State of Georgia, and thereafter application for certiorari was made to the Supreme Court of the State of Georgia which denied the petition. A motion to stay the remittitur was granted by the Court of Appeals of the State of Georgia pending the filing of a petition for the writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

I.

It has been recognized from the outset that the controlling issue in this case is whether the affidavit in support of the search warrant can be squared with the requirement of the Fourth Amendment to the United States Constitution which mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation ..."

While it is unnecessary that the affiant who makes the warrant application have direct, personal knowledge of all matters reflected in the affidavit, it is equally true that there must be "... a substantial basis for crediting the hearsay ... presented." Jones v. United States, 362 U.S. 257, 268 (1960).

While the potential sources of information in an application for a search warrant are almost infinite, the constitutional standard for assessing

the information provided by unnamed informants may be clearly stated:

> "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information 'reliable.'" Aguilar v. Texas, 378 U.S. 108, 114 (1964) (citation omitted).

In this case, the Fourth Amendment question can be even further distilled because in considering the three sources of information in the warrant application, i.e., unnamed informants identified as Sources A and B, and petitioner, there is no quarrel with the conclusion that the reliability of Source A was adequately established. However, it cannot be gainsaid that Source A lacked any direct knowledge concerning the presence of controlled substances on the searched premises because he never went inside; the only information about controlled substances is derived from Source B. This follows from an analysis of the one-page affidavit, the only evidence offered to the magistrate in support of the application for the warrant.

When hearsay statements attributed to Source B are eliminated from consideration, the relevant portion of the affidavit is reduced to the following: (1) Source A went with Source B to the searched premises and waited outside while Source B went in; (2) Source B returned to Source A's vehicle and showed him, Source A, something. The substance is in no way described in the affidavit, nor is there any indication of how Source A or the affiant could possibly identify the substance as cocaine, yet it was on this basis that the warrant issued.

It is also undeniable that Source B's reliability was not addressed in the affidavit either directly or inferentially. It is therefore clear that the magistrate was not informed of any underlying circumstances from which the affiant could conclude that Source B was credible or his information reliable. Because it was only through Source B that it could be established that narcotics were on the searched premises, it follows that the affidavit is insufficient, and that the search warrant cannot be squared with the warrant requirement of the Fourth Amendment as construed by Aguilar v. Texas, supra, and its progeny.

II.

In Stone v. Powell, 428 U.S. 465 (1976), this Court held that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus

relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. It was manifest in Stone v. Powell that the Court was not willing to assume that state courts lacked sensitivity to federal constitutional rights, nor that the federal judiciary possessed more expertise than their state counterparts in reserving search and seizure claims. 428 U.S. at 493, n. 35.

Whatever one's views on the adequacy of this Court's certiorari jurisdiction as a means of effectuating Fourth Amendment values which arise in litigation before the state courts, the fact of the matter is that under existing law, it is only in the context of petitions for certiorari that federal courts will be able to entertain such Fourth Amendment claims, at least where there was a full and fair opportunity to litigate such claims. It thus becomes imperative for this Court to provide meaningful review of Fourth Amendment claims arising in the state courts, particularly where on the basis of an extremely limited factual record, a clearly erroneous decision is made.

An examination of the proceedings in this case indicates a stipulation between the parties that no evidence was offered to the magistrate in support of the search warrant other than one very short affidavit. Petitioner was afforded an opportunity of presenting legal arguments

concerning the sufficiency of that affidavit, and thus cannot contend that a full and fair opportunity to litigate the claim was not afforded. Nevertheless, the judgment sustaining the motion to suppress evidence was reversed by the Court of Appeals of the State of Georgia, and that decision was not overturned on certiorari by the Supreme Court of Georgia despite the patent insufficiency of the affidavit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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